FILED
CLERK, U.S. DISTRICT COURT
MAR 15 2013
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SETH D. HARRIS, Acting Secretary of the United States Department of Labor, Plaintiff, v. GREATBANC TRUST COMPANY, et al., Defendants.	Case No. EDCV12-1648-R (DTBx) **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS COUNT II OF COMPLAINT WITHOUT LEAVE TO AMEND AND DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT GREATBANC TRUST COMPANY'S AFFIRMATIVE DEFENSES**

I. INTRODUCTION

On September 28, 2012, plaintiff Seth D. Harris, Acting Secretary of the United States Department of Labor ("Secretary"), filed a Complaint against GreatBanc Trust Company ("GreatBanc"), Sierra Aluminum Company ("Sierra Aluminum"), and, nominally, the Sierra Aluminum Company Employee Stock Ownership Plan (the "ESOP") (Sierra Aluminum and the ESOP collectively are referred to as the "Sierra Defendants"). The Secretary alleges claims for violations of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. § 1001, *et seq.*) ("ERISA") and seeks relief under ERISA §§ 409 and 502(a)(2) & (a)(5) (29 U.S.C. §§ 1109 and 1132(a)(2) & (5)).

Presently before the Court are the following motions: 1) GreatBanc's Motion to Dismiss Count II of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; 2) Sierra Defendants' Motion to Dismiss Count II of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure; and 3) the Secretary's Motion to Strike GreatBanc's Affirmative Defenses.

The Motions came on regularly for hearing on March 4, 2013 at 10:00 a.m. After full consideration of the pleadings, the papers, and arguments of counsel, and good cause appearing, the Court hereby GRANTS GreatBanc's and the Sierra Defendants' Motions to Dismiss without leave to amend and DENIES the Secretary's Motion to Strike.

II. RELEVANT ALLEGATIONS

Sierra Aluminum is a California corporation located in Riverside, California, that produces extruded aluminum products. (Compl. ¶ 6.) Sierra Aluminum sponsors the ESOP, which it established on March 31, 2001. (Compl. ¶¶ 7, 10.) The ESOP is funded exclusively through employer contributions, as determined by Sierra Aluminum's Board of Directors, in the form of cash or shares of Sierra Aluminum stock. (Compl. ¶ 11.) The ESOP is governed by ERISA. (Compl. ¶ 7.)

On April 1, 2005, Sierra Aluminum entered into an engagement agreement with LaSalle Bank, pursuant to which LaSalle became Trustee of the ESOP. (Compl. ¶ 12.) LaSalle served as Trustee for seven months until October 31, 2005, when GreatBanc replaced it and assumed all of LaSalle's rights and responsibilities. (Compl. ¶ 13.)

GreatBanc's engagement agreement with Sierra Aluminum contains the following indemnification provision ("Indemnification Agreement"):

> 14. Indemnification.
>
> For purposes of this Section 14, the term "Indemnitees," shall mean [GreatBanc] and its officers, directors, employees, and agents. Subject to the applicable provisions of ERISA, [Sierra Aluminum] shall indemnify the Indemnitees for any loss, cost, expense or other damage, including attorney's fees, suffered by any of the Indemnitees resulting from or incurred with respect to any legal proceedings related in any way to the performance of services by any one or more of the indemnitees pursuant to this Agreement, the Plan or the Trust. The indemnification provided for in this Section 14 shall include, but not be limited to: (a) any action taken or not taken by any of the Indemnitees at the direction or request of [Sierra Aluminum], any agent of [Sierra Aluminum], or any committee or fiduciary under the Plan or Trust; and (b) all costs and expenses incurred by the Indemnitees in enforcing the indemnification provisions of this Section 14, including attorney's fees and costs. However, these indemnification provisions shall not apply to the extent that any loss, cost, expense, or damage with respect to which any of the Indemnitees shall seek indemnification is held by a court of competent jurisdiction, in a final judgment from which no appeal can be taken, to have resulted either from the gross

negligence or willful misconduct of one or more of the Indemnitees or from the violation or breach of any fiduciary duty imposed under ERISA on any one or more of the Indemnitees. An Indemnitee who receives an advancement of fees or expenses from [Sierra Aluminum] pursuant to this paragraph shall make arrangements reasonably satisfactory to[Sierra Aluminum] to ensure that such Indemnitee will reimburse [Sierra Aluminum] for such advancements in the event it is determined the Indemnitee is not entitled to retain such amounts hereunder.

(Compl. ¶ 61.)

Count II of the Secretary's complaint alleges that Section 410(a) of ERISA (29 U.S.C. § 1110(a)) invalidates the Indemnification Agreement. (Compl. ¶¶ 61-62.) The Secretary alleges that because the ESOP owns 100% of Sierra Aluminum, enforcement of the Indemnification Agreement would harm the ESOP because payments of defense costs or indemnification would decrease Sierra Aluminum's assets and, therefore, the value of its stock. (*Id.* ¶ 64.) In addition, the Secretary alleges that the Indemnification Agreement improperly permits Sierra Aluminum to indemnify GreatBanc even if it breached its fiduciary duties under ERISA in the event the parties settle the case rather than obtain a final, non-appealable judgment. (*Id.* ¶¶ 72, 75.)

III. LEGAL STANDARD

To withstand a motion to dismiss, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level" and must state "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). In resolving a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded allegations as true. *See Cahill v. Liberty Mutual Ins.*

Co., 80 F.3d 336, 337-38 (9th Cir. 1996). "Assertions that are mere 'legal conclusions,' however, are not entitled to the assumption of truth." *Adams v. I-Flow Corp.*, No. CV 09-09550 R (SSx), 2010 WL 1339948, at *2 (C.D. Cal. Mar. 30, 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

As to the Secretary's motion to strike, Federal Rule of Civil Procedure 12(f) provides that "the court may strike from a pleading [on its own or upon motion made by a party] an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Redundant" means allegations "that are needlessly repetitive or wholly foreign to the issues involved in the action." *State of California Dep't. of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F. Supp.2d 1028, 1033 (C.D. Cal. 2002) (citation omitted). "'Immaterial' means "that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994) (citation omitted). "Impertinent" matters consist of statements that do not pertain, and are not necessary to the issues in question. *Id.*

IV. DISCUSSION

A. The Secretary's Second Claim For Relief To Void The Indemnification Agreement Under ERISA § 410(a).

Defendants seek dismissal of the Secretary's Second Claim for Relief on the grounds that the Secretary has failed to allege plausible facts supporting its claim that ERISA § 410(a) voids the Indemnification Agreement. The Court agrees.

Under ERISA § 410(a), "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under this part shall be void as against public policy."

The Indemnification Agreement at issue in this case expressly prohibits indemnification if a court enters a final judgment from which no appeal can be taken finding GreatBanc liable for breach of its fiduciary duties under ERISA, and therefore the Indemnification Agreement does not run afoul of ERISA 410(a). The indemnification agreement that was at issue in *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009) is different than the Indemnification Agreement in this case, in that the Couturier indemnification agreement did not exclude indemnification for breaches of fiduciary duty under ERISA. In *Couturier*, the plaintiffs sought to preliminarily enjoin a company's advancement of defense costs to ESOP trustees under an indemnification agreement, where the ESOP owned 100% of the company. *Id.* at 1075. The *Couturier* court's decision to invalidate the indemnification agreement turned on three factors not alleged here: (1) the agreement did not exclude indemnification for breaches of fiduciary duties under ERISA; (2) plaintiffs had met their burden of proving all of the requisite elements for a preliminary injunction, including that they would likely succeed in proving that the defendants breached their ERISA fiduciary duties; and (3) the plan sponsor no longer was an operating company, had sold substantially all its assets to another company, and had adopted a plan of liquidation pursuant to which the ESOP participants would receive the net cash proceeds. Were it not for the rather unique circumstances present in the *Couturier* case, under which payments to indemnitees would reduce dollar-for-dollar the funds to be distributed to the ESOP participants pursuant to the plan of liquidation, the plan asset regulations, 29 C.F.R. Section 2510—3.101(a)(2) and 3.101(h)(3), would have applied and the assets of the plan sponsor company would not have been treated as assets of the ESOP and no basis under ERISA would have existed for concluding that the indemnification agreement would harm the ESOP. *Id.* at 1078-81. *Couturier* is inapplicable to this case, as the Complaint here does not allege facts consistent with any of the above-mentioned factors present in *Couturier*.

Notwithstanding that the Indemnification Agreement in this case precludes indemnification if a court enters a final non-appealable judgment concluding that GreatBanc breached its fiduciary duties under ERISA, the Secretary argues that the

Indemnification Agreement is void under ERISA § 410(a) for two reasons: (1) in the event of a settlement, GreatBanc could obtain the benefit of defense and indemnification from Sierra Aluminum even if GreatBanc admits it breached its fiduciary duties under ERISA; and (2) the Indemnification Agreement does not specify how GreatBanc will reimburse Sierra Aluminum for advanced defense costs if a court ultimately determines that GreatBanc breached its duties under ERISA.

1. Settlement Agreements.

The Secretary argues for an extension of the anti-exculpatory language of Section 410(a) to settlement agreements. The Secretary cites no legal authority that supports extending the reach of Section 410(a) to preclude advancement of defense costs incurred by a fiduciary in defending an action alleging fiduciary breach because of the mere possibility that the parties may settle the case rather than obtain an adjudication on the merits. Indeed, the only case cited by the parties addressing this contention rejected it. *See Martinez v. Barasch*, 01 Civ. 2289 (MBM)(JCF), 2006 WL 435727, at *4-5 (S.D.N.Y. Feb. 22, 2006) (holding that "settling defendants may generally enforce contractual indemnity rights without running afoul of ERISA," so long as the "specific contract provisions do not violate Section 410(a)'s prohibition against exculpatory indemnity clauses"). Furthermore, notwithstanding that defendants rarely admit liability in a settlement agreement, this is the Secretary's lawsuit and as the plaintiff, the Secretary is free to condition its consent to any settlement of this case on any terms it believes are appropriate.

2. Reimbursement of Advanced Attorneys' Fees and Costs.

If the Secretary is concerned about GreatBanc's ability to reimburse advanced defense costs in the event that a court ultimately determines that GreatBanc breached its duties under ERISA, the Secretary may seek a bond. Setting aside the indemnification agreement is not necessary or appropriate.

B. The Secretary's Motion To Strike GreatBanc's Affirmative Defenses.

In light of the Court granting GreatBanc's and the Sierra Defendants' Motions to Dismiss, the Court denies the Secretary's Motion to Strike GreatBanc's Affirmative Defenses.

V. CONCLUSION

In light of the foregoing, the Court GRANTS GreatBanc's and Sierra Defendants' Motions to Dismiss without leave to amend, and DENIES the Secretary's Motion to Strike GreatBanc's Affirmative Defenses.

IT IS SO ORDERED.

Dated: March 15, 2013

Hon. Manuel L. Real
United States District Judge